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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1671

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DEMARCO, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Special Prosecutor, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. A, *infra*) is not yet reported. The opinion of the District Court (App. B, *infra*) is reported at 401 F. Supp. 505 (C.D. Cal.).

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1977. By order of April 15, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When co-defendants have secured a transfer of the charges against them to their respective districts of residence pursuant to 18 U.S.C. 3237(b), may the Government, consistently with this Court's opinion in *Blackledge* v. *Perry*, 417 U.S. 21, restructure its case to include additional charges for which there was no venue in the district of original indictment, and, if so, may the Government, in an effort to preserve a joint trial, inform the defendants, while their motions for change of venue are pending, that, if those motions are granted, they could be subject to such additional charges?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

18 U.S.C. 3237(b) provides in relevant part:

> " . . . where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information."

STATEMENT

Background of the Case

This case has its origins in the numerous investigations into the circumstances surrounding the preparation of the 1969 joint tax return of Richard and Patricia Nixon.

On April 4, 1974, the Attorney General of the United States authorized the Watergate Special Prosecution Force (WSPF) to conduct an investigation into the circumstances surrounding the preparation of the 1969 Nixon tax return and matters related thereto. Prior to April 1974 both the Internal Revenue Service and the Joint Committee on Internal Revenue Taxation had conducted official investigations of this matter. The WSPF investigation and the concurrent investigation by the federal grand jury for the District of Columbia were focused both on the actual preparation of the Nixon tax returns and on the statements and submissions of documents made by witnesses during these earlier inquiries. Opinion of the District Court, App. B, 7a; Horowitz Affidavit in Opposition to Motion to Dismiss (hereafter "Aff."), paragraphs 3 and 4.[1] Among the statements under investigation by the WSPF was one made by Frank DeMarco, Jr., an attorney for Mr. Nixon, to IRS agents in California on February 22, 1974. The alleged falsity of that statement formed the basis for the indictment the dismissal of which is the subject of this petition.

During the course of the WSPF investigation, DeMarco was represented by retained counsel, Charles McNelis, Esq. Mr. McNelis had represented DeMarco in connection with this matter beginning in January 1974 and, in

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[1]The pertinent portions of the Horowitz Affidavit are attached to this petition as Appendix C.

the course of his representation he had numerous conversations concerning the case with Assistant Special Prosecutor Jay Horowitz, who was in charge of the investigation. In several of these conversations, Mr. McNelis inquired whether the truthfulness of DeMarco's statement on February 22, 1974, was an issue of concern in the investigation. He was told that DeMarco's statements to the IRS agents were a matter of concern and also that, in the Government's opinion, the evidence appeared to establish that these statements had not been truthful. Aff., paragraphs 5 and 6.

In January and February 1975, the WSPF drafted an indictment which subsequently was returned in the District of Columbia as Indictment 75-123. The proposed indictment included charges against both DeMarco, who had signed as preparer of the 1969 Nixon tax return, and Mr. Ralph G. Newman, an appraiser of rare books who also had performed work in connection with Mr. Nixon's claimed gift of papers. Although, by this late stage of the investigation, there was, in the Government's judgment, evidence which strongly established that DeMarco had made false statements during the February 22, 1974, interview, it was clear that any prosecution of DeMarco arising out of that interview could only be had in the Central District of California where the IRS interview had taken place and could only be initiated by the filing of an indictment separate from the proposed joint indictment of Newman and DeMarco in the District of Columbia. Although evidence of the February 22, 1974 interview as presented to the District of Columbia grand jury, the grand jury was not asked to return any charges based on DeMarco's February 22, 1974, interview. Consequently, in the weeks prior to the filing of Indictment No. 75-123, Mr. Horowitz informed Mr. McNelis, who, as noted above, previously had expressed to the WSPF

his concern about the February 22, 1974, interview, that there was no venue in the District of Columbia for any prosecution relating to DeMarco's statements on that date. Aff., paragraphs 6 and 7.

Proceedings in the District of Columbia

Indictment No. 75-123, returned in the District Court for the District of Columbia on February 19, 1975, contained four counts. Count One charged DeMarco and Newman as defendants, and Edward L. Morgan as a co-conspirator but not as a defendant, with a conspiracy, allegedly carried on from March 1970 to August 1974, to defraud the United States by impairing and obstructing the functions of the IRS to ascertain and assess federal income taxes due and owing from the Nixons, in violation of 18 U.S.C. 371.[2] Count Two charged Newman alone with the knowing preparation, in March and April 1970, of a false and fraudulent document submitted to the IRS together with the 1969 Nixon tax return, in violation of 26 U.S.C. 7206(2). Count Three charged DeMarco alone with making false statements on January 18, 1974, in Washington, D.C., to IRS agents conducting an audit of the Nixon tax returns (an inquiry different from the later IRS investigation during which DeMarco's February 22, 1974, interview took place), in violation of 18 U.S.C. 1001. Count Four charged DeMarco alone with endeavoring in February 1974 to obstruct an investigation by the Joint Committee on Internal Revenue Taxation of the Congress of the United States, in violation of 18 U.S.C. 1505.

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[2]On November 8, 1974, Morgan, a former Deputy Counsel to the President, pleaded guilty to a similar charge. Morgan was sentenced on December 19, 1974, to a term of 2 years, 4 months of which was to be served in a jail-type institution. Morgan has served his term of imprisonment.

On March 19, 1975, DeMarco and Newman each moved under 18 U.S.C. 3237(b) for a change of venue to his district of residence, the Central District of California and the Northern District of Illinois, respectively. Each did so with the knowledge that there were possible charges which had been considered prior to the filing of Indictment No. 75-123 which could be brought against him in the proposed transferee district but for which there had been no venue in the District of Columbia. In conversations with Mr. Horowitz, counsel for DeMarco and Newman indicated that the motions for change of venue had been filed not only for purposes of transferring these cases out of the District of Columbia but also for purposes of gaining a severance. Aff., paragraphs 6, 7, 8 and 11.

Over the Government's strenuous opposition, the Honorable Oliver Gasch, United States District Judge, on April 16, 1975, granted the defendant's motions to transfer. Upon the denial of the Government's motion for reconsideration, there was filed, on May 6, 1975, with the United States Court of Appeals for the District of Columbia a petition for a writ of mandamus. In its petition, the Government urged that section 3237(b) did not apply to the charges in the indictment and that the District of Columbia clearly was the most convenient forum for the trial of the case, the latter position being undisputed. In the petition the Government also made clear that its principal concern was not the transfer but the inevitable severance of the case caused by any change in venue. Thus, the petition stated:

> "Although the Government does not believe that transfer is warranted, it objects not so much to the transfer out of the District of Columbia as it does the resulting severance."

Gov. Pet. 31-32. Indeed the Government noted that it "would consent to transfer of the entire case to one district." *Id.* at 32, n. 21; Aff., paragraphs 8 and 9.

During this litigation, Mr. Horowitz had several conversations with Mr. McNelis and with counsel for Mr. Newman concerning venue. Mr. Horowitz indicated that the Government believed that it ultimately would prevail on this issue, but at the same time, in view of the possible lengthy delay caused by the pre-trial litigation, Horowitz stated that the Government would be willing to compromise by agreeing to a trial anywhere, provided that the trial was a joint trial on the indictment as filed. Mr. Horowitz also pointed out that, if the defendants ultimately prevailed on their motions to change venue, the Government would have to contemplate a restructuring of its case. Mr. Horowitz told counsel that in this event the Government would consider presenting evidence to the federal grand juries for the respective transferee districts concerning possible charges for which there had been no venue in the District of Columbia. Horowitz repeatedly noted, however, that the Government might consent to the dismissal of some of the pending charges. Aff., paragraphs 10, 11 and 12.

Proceedings in the Central District of California

Neither defendant expressed interest, and on July 9, 1975, the Court of Appeals denied the Government petition. Shortly thereafter the charges against DeMarco and Newman were transferred, and on July 28, 1975, DeMarco was arraigned before Judge Ferguson of the Central District of California. At that time, Mr. Horowitz informed the Court of the Government's intention to present evidence to the grand jury and to request a new indictment, as well as to move for dismissal of one of the pending

charges.[3] On July 29, 1975, evidence concerning DeMarco's February 22, 1974, interview by the IRS agents was presented to the grand jury, which returned Indictment No. CR 75-1188-F, charging DeMarco with a violation of 18 U.S.C. 1001. Aff., paragraph 17.

On September 11, 1975, Judge Ferguson denied all defense motions to dismiss the transferred charges but granted the motion to dismiss Indictment No. CR 75-1188-F. Later that same day, the Government's motion for leave of court to dismiss Count One was granted by Judge Ferguson. The case then proceeded to trial against DeMarco on the two transferred charges remaining - Counts Three and Four.[4]

The Newman Case

Upon the transfer of the case against Newman to the Northern District of Illinois, proceedings followed a course similar to that followed in *DeMarco*. The Government first presented evidence to the grand jury concerning a statement by Newman to IRS agents in Chicago, and a one-count indictment was returned on August 14, 1975. Newman moved to dismiss this indictment on grounds that were identical in all material respects to those advanced by DeMarco, but Judge McGarr denied the motion. The Government then moved to dismiss the conspiracy charge as it had in California, and Newman went

[3]At the time of the arraignment the Government was considering moving to dismiss Count Three which charged a violation of 18 U.S.C. 1001. Subsequently, as discussed *infra*, the Government moved to dismiss Count One, which charged the conspiracy in violation of 18 U.S.C. 371.

[4]After selection of a jury and the presentation of three weeks of evidence, but prior to the close of the Government's case, Judge Ferguson dismissed these counts as well. No appeal was taken from that decision.

to trial on the two charges against him. On November 12, 1975, the jury found him guilty on both counts, and on January 6, 1976, he was sentenced to pay fines totaling $10,000. No appeal was taken from this judgment.

The Opinions Below

The District Court dismissed the indictment in CR 75-1188-F on the ground that the Government's "threats" to bring additional charges against DeMarco, if he succeeded in securing a change of venue to Los Angeles, deprived the defendant of due process.[5] The court expressly found that the Government had not acted vindictively by seeking the California indictment[6] but nonetheless held that dismissal was required because "a contrary decision would permit the 'potential for vindictiveness' proscribed in *Blackledge* v. *Perry* . . . to deter the exercise of rights guaranteed to criminal defendants by federal statute." App. B, 7a. In reaching its decision, the court relied on the affidavits filed in support of and in opposition to the motion to dismiss, concluding that there was "no basic inconsistency" between them.[7]

The Court of Appeals sustained the dismissal, holding that *Blackledge* and *North Carolina* v. *Pearce*, 395 U.S.

[5]Judge Ferguson also grounded his decision on the Government's failure to disclose to the grand jury the procedural background of the case. The Court of Appeals, however, did not address this question, and the issue is not, therefore, encompassed within this petition.

[6]"The Court does not believe nor does it imply whatsoever that there was any vindictiveness on behalf of Mr. Horowitz or anyone else in the Special Prosecutor's Office . . . ." Transcript of Proceedings of September 11, 1975, 152-153 (reprinted in part as Appendix D, *infra*).

[7]The relevant portion of DeMarco's Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment is reprinted, *infra*, as Appendix E.

711, had created a prophylactic rule designed to prevent prosecutive conduct with the potential for creating a "fear of vindictiveness," and that that rule was applicable to defendant's exercise not only of his right to appeal but of his statutory right to a change of venue as well - rights the court found to be "laden with due process concern." App. A, 5a. The Court also found that the District Court's characterization of the Government's conduct as threatening was amply supported by the record.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals constitutes a wholly unwarranted extension of this Court's holdings in *North Carolina* v. *Pearce*, 395 U.S. 711, and *Blackledge* v. *Perry*, 417 U.S. 21, an extension which, if left uncorrected, has the potential for seriously inhibiting that free communication between prosecutor and defense counsel without which there can be no effective administration of the criminal justice system.

1. In *North Carolina* v. *Pearce* this Court held that a defendant, after being sentenced on an initial conviction from which he appeals successfully, may not be subjected to a more severe penalty on retrial unless it can be shown affirmatively that the increased sentence is based upon the defendant's conduct after the first sentencing. The Court reasoned that, if the rule were otherwise, defendants might be deterred from exercising appellate or collateral remedies because of a fear of retaliatory action but emphasized that this meant not that there could never be a more severe sentence after retrial but only that such a sentence would have to be justified on the record.

In *Blackledge* v. *Perry*, the Court applied the *Pearce* doctrine to acts of the prosecution. The defendant Perry originally was convicted in the North Carolina District

Court on a misdemeanor charge arising out of a prison fracas. During the pendency of Perry's appeal to the Superior Court, where he had statutory right to a trial *de novo*, North Carolina brought a felony charge against him on the basis of the *same facts* that underlay the misdemeanor conviction. This Court, in finding the felony indictment offensive to due process, held that the defendant was entitled to pursue his appeal "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased period of incarceration." 417 U.S. at 28. This result was required even in the absence of evidence that, in Perry's case, the state had acted in bad faith or maliciously, because there was a "realistic likelihood of 'vindictiveness'," 417 U.S. at 27, inherent in the state's ability to discourage statutory appeals "by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursued his statutory appellate remedy." 417 U.S. at 28. At the same time, however, the Court stated that, "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal," 417 U.S. at 27, and, indeed, noted that "this would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset . . . ." 417 U.S. at 29, n. 7.

This review of *Blackledge* illuminates two major and controlling distinctions between that case and the case at bar which undercut the lower court's conclusion that the principles delineated in *Blackledge* compel dismissal

First, in *Blackledge* the same underlying facts were originally amendable to prosecution either as a felony or a misdemeanor. By contrast, Indictment No. CR 75-1188F, charged DeMarco not with a more serious offense based on events underlying the original indictment but with an offense arising out of facts - i.e., the interview of DeMarco

in California on February 22, 1974 - which could not have formed the basis of any charge in the District of Columbia.

This distinction is exceptionally important because it bears directly on prosecutorial motives. Where the prosecution has the discretion to prosecute certain criminal conduct with varying degrees of severity and initially opts for the less severe charge, there is a tacit assumption that the decision so to proceed was sound and rational and encompassed a rejection of the more severe alternative. A subsequent substitution of the more severe charge, based on the same facts, makes the motives of the prosecution presumptively suspect. See *Hayes* v. *Cowan*, 547 F. 2d 42, 44-45 (C.A. 6).

The second major distinction between *Blackledge* and the instant case is found in the circumstances giving rise to the initiation of the second prosecution. In *Blackledge*, the prosecution, when it initially opted for the less severe charge, was free of any legal or equitable restraint on the bringing of the harsher charge. Thus, as has been noted, the decision not to proceed on the felony charge in *Blackledge* was explicable only in terms of a knowing and rational acceptance of the misdemeanor as an appropriate characterization of the defendant's conduct. When the felony charge was brought, the only intervening event had been Perry's appeal.

By contrast, the transfer of the case against DeMarco from the District of Columbia to the Central District of Columbia removed an equitable restraint on prosecution. In early February, 1975, the Government could have indicted DeMarco in Washington and in Los Angeles on the separate false statement counts. DeMarco conceded as much in his Brief on Appeal (pp. 22-23). From the pre-indictment vantage point, such a decision by the Government would have subjected DeMarco to multi-district, pre-trial

litigation at opposite ends of the continent. It would also have meant that a resolution of all charges against DeMarco would have required two trials.

It is clear, therefore, that the decision not to seek an indictment in the Central District of California was founded on considerations having nothing to do with the viability of the charge or, as in *Blackledge*, with a preference for a milder version of it. It was, purely and simply, a question of equitable restraint on prosecution.[8] Once DeMarco's case was transferred from the District of Columbia to the Central District of Columbia, those equitable restraints ceased to exist. Further, it was now possible to resolve all charges against DeMarco in one trial. Nothing comparable triggered the felony prosecution in *Blackledge*.

The Court of Appeals rejected these distinctions. It concluded that the apprehension of vindictiveness was enough to bring this case within *Blackledge* and that the prophylactic rule of *Pearce* and *Blackledge* imposed "limits upon prosecutorial discretion in seeking new indictments when such actions carry with them the opportunity of retaliation for a defendant's exercise of a statutory right that has due process implications." App. A, 6a.

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[8]This restraint is comparable to the policy described by the Solicitor General and approved by the Supreme Court in *Petite* v. *United States*, 361 U.S. 529, 530:

> "Several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement."

Since, in the instant case, the Government announced its intention to move to consolidate the Central District of California charge for trial with the transferred charge (Transcript of Proceeding for July 28, 1975, p. 8), the "several offenses" would in fact have been tried together.

Pearce did not, however, absolutely prohibit an increased sentence on retrial; it merely held that there must be an adequate and objective basis for the increase, negating retaliation as a cause. A defendant appealing a judgment of conviction must still fear the possibility of an increased sentence upon retrial and reconviction under certain circumstances; what he need not fear is the possibility that the increase will be a product of vindictiveness. Similarly, *Blackledge* left open the option of an increased charge by noting that, "the lesson that emerges . . . is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'." 417 U.S. at 27. It is clear, therefore, that there exists no "prophylactic rule" that would eliminate all discretion to proceed wherever the opportunity for retaliation exists. Where changed circumstances justify the bringing of an additional charge after a defendant has exercised a statutory right, the prosecutor's decision is not vulnerable to attack under *Blackledge* and *Pearce*.

It is important to recognize that, until the transfer motion was granted, the Government did not have the option of resolving all criminal charges against DeMarco in a single prosecution. Transfer afforded the Government previously unavailable options - a situation in which *Blackledge* uniformly has been held not to apply. *United States* v. *Preciado-Gomez*, 529 F. 2d 935 (C.A. 9), *certiorari denied*, 425 U.S. 983; *United States* v. *Anderson*, 514 F. 2d 583 (C.A. 7); *United States* v. *Butler*, 414 F. Supp. 394 (D. Conn.); *United States* v. *Newman*, 75 Cr. No. 508 (N.D., Ill) (unreported). A different result follows in those cases where the prosecution merely confronts for a second time a choice it has already made and elects to bring more severe charges based on the same facts. It is then that a defendant's anxieties about possible vindictiveness may limit

the Government's options. *Hayes* v. *Cowan*, 547 F. 2d 42. (C.A. 6); *United States* v. *Johnson*, 537 F. 2d 1170 (C.A. 4); *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (C.A. 9); *United States* v. *Gerard*, 491 F. 2d 1300 (C.A. 9); *United States* v. *Jamison*, 505 F. 2d 407 (C.A. D.C.).

In this case, such potential for vindictiveness was never present, and because the District Court explicitly concluded that there had been no vindictiveness in fact, there was no basis for dismissal of the indictment.

2. Once it is established that the return of the California indictment itself did not violate DeMarco's due process rights, it must follow that the Government had the right to inform his lawyer of its intent to seek that indictment. The conduct prohibited by *Blackledge* occurred under circumstances in which the defendant's exercise of his statutory right of appeal left the prosecutor in exactly the same position he was in when he first made his decision to charge. There was, on its face, only one reason for the prosecutor's "upping the ante," and *a fortiori*, therefore, it would have been improper for him to have used the possibility of a more severe charge to dissuade the defendant from exercising his right. Similarly, if the prosecutor here had informed DeMarco's lawyer that he intended simply to add to the indictment counts which were as available in Washington as they were in Los Angeles, his conduct would have fallen within the *Blackledge* proscription, for the election to seek a change in venue would not have altered the options available to the Government. But where that election removed a barrier to prosecution, albeit a barrier solely of a discretionary nature, it would have been unconscionable for the prosecutor to remain silent, only to surprise the defendant with new charges after the case was transferred.

Both the District Court and the Court of Appeals characterized the prosecutor's statements to defense counsel as "threats," but this pejorative description should not obscure the underlying facts. The statements at issue, together with the suggestion that one of the pending charges might be dropped, were made in an effort to reach an agreement which would accomodate whatever interest the defendant had in a trial outside the District of Columbia, the Government's interest in a joint trial, and the public's interest in speedy resolution of the important issues involved. To characterize this candid and balanced elucidation of the alternatives as a threat is unjustified and can only serve to inhibit full and open communication between prosecutor and defense counsel.

The record on which both courts relied is a simple one, and the basic facts are not in dispute. The question posed here, without resort to conclusory terms, is this: may a prosecutor, seeking to preserve a joint trial, inform a defendant who intends to exercise his statutory right to a change of venue that, if he succeeds, he may face a restructured case containing additional charges for which there was no venue in the district of the original indictment? If the answer is "no," as the courts below would have it,[9] then every prosecutor must now wonder what he will be permitted to say to defense counsel in the free give-and-take that marks the criminal justice process at its best. If one defendant in a multi-defendant trial moves for severance, is it an impermissible threat for the prosecutor to inform his counsel that, if he succeeds in his motion, evidence otherwise inadmissible in a joint trial

[9]Of course, Judge McGarr's answer to this question in *United States* v. *Newman* was "yes."

will be used against him? Is it a deprivation of due process for a prosecutor to inform defense counsel that, if he elects to call character witnesses, he will bring out on cross-examination damaging information that could not otherwise have been introduced?

For the defendant, many of the decisions to be made during the course of a criminal prosecution involve a balancing of benefit and detriment. He may well be dissuaded from asserting statutory, or even constitutional, rights by the conclusion that he will be more harmed than helped by their exercise. Here, for example, in light of the prosecutor's proposal to resolve the pending venue litigation, defendant might have concluded that the certainty of a trial outside the District of Columbia was sufficiently valuable to warrant foregoing the chance of achieving a severance as well, just as the Government had concluded that it was willing to abandon the possibility of remaining in the District of Columbia in return for the assurance of a joint trial. Or defendant might have concluded that the risk of an additional charge in Los Angeles was insufficient to outweigh the benefits of severance and transfer, if he were to succeed in his motion for a change of venue. Surely, then, it was not improper for the prosecutor to explain candidly what his options would be in the event that the defendant took a particular course of action, unless, as was the case in *Blackledge* but is not the case here, those options would admit of no reasonable explanation other than retaliation. The decision of the court below, failing to recognize the distinction between the cases, discourages the prosecutor's candor and encourages the secrecy which modern criminal procedure is designed to minimize.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES F. C. RUFF
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Watergate Special Prosecution Force

FRANK M. TUERKHEIMER
Special Assistant to the Special Prosecutor

MAY 1977.

DOJ-1977-05

APPENDIX A

UNITED STATES OF AMERICA, APPELLANT,

v.

FRANK DEMARCO, JR., APPELLEE.

No. 75-3824.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

MARCH 30, 1977.

Appeal from the United States District Court for the Central District of California.

Before HUFSTEDLER and GOODWIN, Circuit Judges, and KING,* District Judge.

OPINION

HUFSTEDLER, CIRCUIT Judge:

The Government appeals, under 18 U.S.C. § 3731, from the dismissal of an indictment against DeMarco. The district court gave two reasons for dismissing the indictment: (1) The challenged indictment was the culmination of governmental efforts designed to discourage or to prevent DeMarco from asserting his statutory venue rights, and failure to dismiss the indictment would permit the "potential for vindictiveness" proscribed in *Blackledge* v. *Perry* (1974) 417 U.S. 21, 28, 94 S. Ct. 2098, 40 L. Ed. 2d 628; and (2) the failure of the prosecutor to inform

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*Honorable Samuel P. King, Chief Judge, United States District Court, District of Hawaii, sitting by designation.

the grand jury about the facts leading the prosecutor to seek the California indictment interfered with the deliberative function of the grand jury.[1] Because we agree with district court's application of *Blackledge*, we do not reach the second ground for the district court's decision.

This case grew out of an investigation into the preparation of President Nixon's 1969 income tax return in which a deduction was claimed for the gift of pre-Presidential papers to the National Archives. DeMarco and Ralph Newman were indicted in February, 1975, in the District of Columbia. The indictments charged them with conspiring to defraud the United States; with making false statements to the Staff of the Joint Committee on Internal Revenue Taxation, to Treasury agents, and to agents of the Internal Revenue Service ("IRS") in the District of Columbia; and with obstructing the congressional investigation of President Nixon's tax returns. Newman and DeMarco moved to change venue to the districts of their residence, Chicago and Los Angeles respectively. (18 U.S.C. § 3237(b); Fed. R. Crim. P. 21(b).) The Government vigorously opposed the motions and the resulting severance of the defendants' trials. The district court in the District of Columbia granted the motions. The district court below found that, after the motions were granted, the prosecutor told DeMarco's counsel that "the government was considering filing a motion for reconsideration of the order of transfer, that if [DeMarco] successfully transferred his case to California the government would consider more counts against him, and that the government would 'restructure' the case against him if it came to California." (401 F. Supp. 508.) The prosecutor also told defense counsel that "restructuring" might

[1]The district court's opinion is reported at 401 F. Supp. 505.

possibly lead to his recommending dismissal of some of the original charges. DeMarco insisted upon his venue rights, and the original indictment was transferred to California.[2] The Government obtained a second indictment in California, based on substantially the same facts as the first indictment, with the addition of a specific charge relating to statements that DeMarco made to IRS agents in a California interview on February 22, 1974. The facts upon which the second indictment was founded had been known to the Government long before the first indictment was returned.

The district court found that "the government deliberately used the threat of a new indictment in California to deter the defendant from exercising his statutory [venue] rights" and that the government "threatened to respond [to his exercising his rights] by 'upping the ante.' " (401 F. Supp. at 508-09, *quoting Blackledge*, 417 F. U.S. at 28, 94 S. Ct. 2098.) Those findings are amply supported by the record.

The Government argues that *Blackledge* does not control because here, unlike B*lackledge*, the first and second indictments were not based on identical facts and because the motivation for the Government's threats grew out of limits placed on the original indictment resulting from the policy of the Department of Justice not to pursue contemporaneous indictments, rather than any vindictiveness against the defendant. The Government's contentions rest on misperception of the record and a misreading of *Blackledge*.

[2]The case went to trial on the original indictment, but the indictment was dismissed during the course of trial on grounds unrelated to those involved in this case. The dismissal of the original indictment is not involved on this appeal.

The Government's contention that there had occurred a "major change legitimately bearing on the prosecution function" which justifies distinquishing *Blackledge* is unsupported by the record. The only "major change" was severance resulting from DeMarco's exercise of his statory venue right. The Government cannot rely on the exercise of that right to defeat *Blackledge*. The factual nucleus of both indictments was the same. The District of Columbia indictment did not specifically charge an offense based upon DeMarco's interview with IRS agents in California on February 22, 1974, but the California on February 22, 1974, but the California statement was part of the evidence presented to the District of Columbia grand jury. Moreover, the California statement was a duplicate of DeMarco's statement in the District of Columbia to the Joint Committee, upon which the original indictment was, in part, based.

Even if the first and second indictments were not based on facts that were so similar that a trial on one would have prevented trial on the other upon double jeopardy grounds, that situation would not distinguish this case from *Blackledge*. In *Blackledge* the Court specifically eschewed reliance on double jeopardy. (417 U.S. at 31, 94 S. Ct. 2098). See also *United States* v. *Ruesga-Martinez* (9th Cir. 1976) 534 F. 2d 1367.) Rather, the progenitor of *Blackledge* was *North Carolina* v. *Pearce* (1969), 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656. *Pearce* forbade increasing a sentence upon retrial after the defendant had successfully appealed absent new facts unrelated to the appeal, affecting sentencing. The Court reasoned that fear of vindictiveness for exercising a statutory right to appeal was as forceful as actual vindictiveness in chilling a defendant's "free and unfettered" (*id.* at 724, 89 S. Ct. 2072) choice in deciding to appeal. ("[D]ue process also requires that a defendant be freed of apprehension of

such a retaliatory motivation on the part of the sentencing judge." *Id.* at 725, 89 S. Ct. at 2080.) Apprehension of vindictiveness and the "appearance of vindictiveness" (*United States* v. *Ruesga-Martinez* (9th Cir. 1976) 534 F. 2d 1367, 1369) are adequate to bring this case squarely within *Blackledge*. The district court found those facts against the Government, and we have no basis to disturb those findings.

DeMarco is controlled by the teaching of *Blackledge* unless the statutory right involved (change of venue to the defendant's residence) is so different from the statutory rights to appeal (*North Carolina* v. *Pierce*, *supra*) and to a trial *de novo* (*Blackledge* v. *Perry*, *supra*) as to justify a different result. We perceive no basis for distinguishing DeMarco's venue right under 18 U.S.C. § 3237(b) from the statutory rights considered in *Blackledge* and *Pearce*. As in those cases, the statutory right involved has due process overtones, although none of the rights is constitutionally mandated. The Section 3237(b) venue right is laden with due process concern for a fair trial in which the litigating burdens are not inordinately cast on the defendant. Congress intended to relieve the defendant from the "heavy burden" caused by tax prosecution in a judicial district "substantially distant" from the defendant's residence. (Senate Rep. No. 1952, 85th Cong., 2d Sess. (1958); 1958 U.S. Code Cong. & Admin. News, p. 3262.) The defendant's expense and his difficulties in securing counsel, his problems in finding witnesses (especially character witnesses) who would be able to travel to a distant forum were all considered by Congress in its decision to relieve the defendant from defending himself away from his residence. (*Id.*)

As in *Blackledge*, "the central figure is not the judge or the jury, but the prosecutor. The question is whether the

opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case. We conclude that the answer must be in the affirmative." (417 U.S. at 27, 94 S. Ct. at 2102. See also *United States* v. *Ruesga-Martinez*, supra, 534 F. 2d at 1370-71.) Here, as in *Blackledge*, a prosecutor "has considerable stake in discouraging" defendants from exercising their venue rights when the effect "will clearly require increased expenditures of prosecutorial resources" because the prosecutor loses the advantages of trying alleged conspirators together and must also conduct two trials in different parts of the country. (*Id.*)

Blackledge and *Pearce* each establish a prophylactic rule imposing limits upon prosecutorial discretion is seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation for a defendant's exercise of a statutory right that has due process implications. It is irrelevant that a particular defendant exercises his statutory rights, despite his fear of vindictiveness and despite the lack of vindictiveness in fact in subsequent proceedings instituted by the prosecutor. The prophylactic rule its designed not only to relieve the defendant who has asserted his right from bearing the burden from "upping the ante" but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future.

Under *Pearce* and *Blackledge*, it was not constitutionally permissible for the Government to threaten to "up the to discourage DeMarco from ante exercising his venue right; a *fortiori* it was constitutionally impermissible to follow up the threat with the California indictment. No abuse of discretion is involved in the district court's dismissing the indictment for *Blackledge* taint.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 75-1188-F

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FRANK DEMARCO, JR., DEFENDANT

MEMORANDUM OPINION

On April 4, 1974 Attorney General William Saxbe directed the Watergate Special Prosecution Force "to investigate and prosecute all violations of law arising out of the preparation of President Nixon's 1969 income tax return and the deductions in subsequent years for the gift of pre-Presidential papers to the National Archives . . . ."

This case involves one of the charges brought pursuant to that assignment.

Frank DeMarco, Jr. was indicted on July 29, 1975 in the Central District of California for alleged false statements made to an Internal Revenue Service special agent in violation of 18 U.S.C. § 1001, and he has moved to dismiss the indictment. The motion is granted for two independent reasons. First, due process and this court's responsibility to supervise the administration of criminal justice require the dismissal of this indictment. A contrary decision would permit the "potential for vindictiveness" proscribed in *Blackledge* v. *Perry*, 417 U.S. 21, 28 (1974) to deter the exercise of rights guaranteed to criminal defendants by federal statute. Second, the failure of the prosecutor to inform the grand jury of the relevant facts preceding the initiation of the decision to

charge the defendant in California requires the dismissal of this indictment. Any contrary decision would violate the defendant's right to an "independent and informed grand jury" (*Wood* v. *Georgia*, 370 U.S. 375, 390 (1962)) and would seriously undermine the proper function of the grand jury in our system of criminal justice.

Factual Background

The factual background leading to the defendant's July 29, 1975 indictment in California is as follows:

1. Frank DeMarco, Jr. was initially indicted together with Ralph Newman on February 19, 1975 by a federal grand jury in the District of Columbia.

a. Mr. DeMarco was charged with three offenses:

i. participation in a conspiracy to defraud the United States in violation of 18 U.S.C. § 371;

ii. the making of false and fraudulent statements to Internal Revenue Service agents in the District of Columbia in violation of 18 U.S.C. § 1001;

iii. an endeaver to unlawfully, willfully, knowingly, and corruptly obstruct the proceedings of the Joint Committee on Internal Revenue Taxation of the Congress of the United States in violation of 18 U.S.C. § 1505.

b. Mr. Newman was charged with two offenses:

i. participation in a conspiracy to defraud the United States in violation of 18 U.S.C. § 371;

ii. aiding in the preparation of a false and fraudulent document with knowledge of its falsity in connection with the filing of the 1969 joint federal income tax return of Richard M. and Patricia R. Nixon in violation of 18 U.S.C. § 7602(2).

2. Defendants Newman and DeMarco timely filed motions which insisted upon their statutory right to be tried in the district of their residence. 18 U.S.C. § 3237 (b). DeMarco conceded that 18 U.S.C. § 3237(b) did not authorize a transfer of the 18 U.S.C. § 1001 charge against him but contended that that charge too should be transferred to his home district in order to effect the convenience of the parties and witnesses and the interest of justice. Fed. R. Crim. P. 21(b).

3. The government vigorously opposed these motions contending that the charges contained in the indictment were not subject to the transfer provisions of 18 U.S.C. § 3237(b).

4. On April 16, 1975 Judge Oliver Gasch granted the defendant's motion. He, therefore, ordered that the charges against Mr. Newman be transferred to the Northern District of Illinois and that the charges against Mr. DeMarco be transferred to the Central District of California.

5. On April 17, 1975, Charles McNelis, counsel for DeMarco, received a telephone call from Jay Horowitz of the Watergate Special Prosecution Force. In substance, Mr. Horowitz informed Mr. McNelis that the government was considering filing a motion for reconsideration of the order of transfer, that if the defendant successfully transferred his case to California the government would consider bringing more counts against him, and the government would "restructure" the case against him if it came to California.

After the government filed and lost its motion for reconsideration, Mr. Horowitz in another telephone call told counsel for DeMarco that if DeMarco did not agree to a joint trial with Newman he would be indicted in Los Angeles for the offense which has since become the subject of this motion.

Mr. Horowitz has informed the court that the facts supporting the charge which is the subject of the California indictment were developed long before these telephone calls (indeed long before the indictment was brought in the District of Columbia), and that the government had communicated this fact to Mr. McNelis before DeMarco's indictment in the District of Columbia, but that the Government had refrained from filing the charge because venus in the District of Columbia would not lie and the government did not wish to bring two separate prosecutions against the defendant.

Mr. Horowitz further indicates he informed DeMarco's counsel that in restructuring the charges in Chicago (against Newman) and in Los Angeles (against DeMarco) the government would "*perhaps* consent to the dismissal of some of the pending charges." (emphasis added). Moreover he maintains that the "tone" of the telephone conversations was not "threatening."

In short, the government characterizes these telephone conversations as "common and entirely proper discussions between adverse counsel litigating over a complicated procedural issue."

This court finds no basic inconsistency between the renditions of these conversations as reported by opposing counsel. The "tone" of these conversations was probably not threatening; the substance surely was. The government *in an effort to prevent the defendant from asserting his statutory venue rights* threatened him with a new indictment in California. This is not to say that the government has now filed this charge out of vindictive or punitive motives; it is to say that at the time of the telephone conversations, the government deliberately used the threat of a new indictment in California to deter the defendant from exercising his statutory rights. More-

over this court finds that the defendant at the time of the telephone conversations was deliberately placed on notice that if he exercised his statutory venue rights, the prosecution threatened to respond by "upping the ante." *Blackledge* v. *Perry*, 417 U.S. 21, 28 (1975). The government's specific promise to drop a charge did not come until after the case had been transferred.

6. The defendant elected to transfer this case to California. During the arraignment on July 28, 1975, Mr. Horowitz informed this court that he intended to present evidence to the grand jury charging the defendant with a violation of 18 U.S.C. § 1001 (for false statements made in California) and that if the grand jury returned an indictment the government would consent to a dismissal of the 18 U.S.C. § 1001 charge (for false statements made in the District of Columbia) contained in the District of Columbia indictment.[1] Mr. Horowitz explained that the government preferred to bring this charge because the statements made in California had been transcribed, but the statements made in the District of California had not. After the defendant filed a motion to dismiss this indictment, the government shifted its position as to which count it intended to drop. In his affidavit of September 5, 1975 (filed in support of the government's opposition to the defense motion), Mr. Horowitz stated that, "The Government still intends to consent to a dismissal of one count of the indictment—the precise count obviously dependent, in the first instance, upon this Court's ruling uon defendant's pre-trial motions."

7. After this court denied defendant's motions to dismiss the counts contained in the District of Columbia indictment and informed the prosecution that the California indictment would be dismissed, the government moved to dismiss the conspiracy count, citing considerations of trial strategy.

8. At no time did the government inform the grand jury in Los Angeles of the facts surrounding the transfer of the case from Washington, D.C. Indeed the grand jury was not informed that any other charges had been filed against the defendant.

The Charge of Retaliation

As previously mentioned, the principles delineated in *Blackledge* v. *Perry, supra,* call for a dismissal of the California indictment. In that case the defendant Perry was initially charged in North Carolina with a misdemeanor charge of assault with a deadly weapon. After a trial without a jury, he was convicted. Under North Carolina procedure, the defendant by filing a notice of "appeal" can annul a misdemeanor conviction and obtain an entirely new trial in the Superior Court. The prosecutor responded to Perry's filing of a notice of appeal by obtaining a grand jury indictment charging him with a felony, *i.e.,* assault with a deadly weapon with intent to kill and inflict serious bodily injury. The United States Supreme Court ruled that the initiation of the felony charge violated due process of law. 417 U.S. at 28-29.

Significantly the Court noted that there was no evidence that the prosecutor "acted in bad faith or maliciously in seeking a felony indictment against Perry." *Id.* at 28. The Court insisted that no retaliatory motivation need be present before considerations of due process become relevant. Instead the Court emphasized that a person was entitled to assert his statutory rights "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." *Id.* The Court looked to the "opportunities for vindictiveness" (*id.* at 27) in the situation and concluded that the due process clause could not countenance the potential for vindictiveness presented in that case.

Similarly Mr. DeMarco was entitled to pursue his statutory venue rights free of the apprehension that the government would retaliate by filing additional charges. *United States* v. *Jamison,* 505 F. 2d 407 (D.C. Cir. 1974); *cf. Garrity* v. *New Jersey,* 385 U.S. 493 (1967). He was entitled to pursue those rights free of threats and intimidation even from threats presented in a non-threatening tone.

The government advances a number of superficially attractive distinctions to avoid the force of *Blackledge.* In the final analysis all of these distinctions are unpersuasive. First, the government contends that the *Blackledge* principles are applicable if but only if the constitutional rights and interests protected by the prohibition against double jeopardy are jeopardized. This crabbed reading of *Blackledge* (although consistent with the facts of the case) cannot be reconciled with the sweeping language of the decision. Indeed the Court flatly states that its decision "is not based upon the Double Jeopardy Clause." *Id.* at 31. The day our Constitution permits prosecutors to deter defendants from exercising any and all of their guaranteed rights by threatening them with new charges fortunately has not yet arrived. The charging power of the prosecutor has been circumscribed in other contexts. *See, e.g., United States* v. *Berrios,* 501 F. 2d 1207 (2d Cir. 1974); *United States* v. *Berrigan,* 482 F. 2d 171 (3d Cir. 1973); *United States* v. *FAlk,* 479 F. 2d 616 (7th Cir. 1973); *United States* v. *Steele,* 461 F. 2d 1148 (9th Cir. 1972); *Dixon* v. *District of Columbia,* 394 F. 2d 966 (D.C. Cir. 1968); *MacDonald* v. *Musick,* 425 F. 2d 373 (9th Cir.), *cert. denied,* 400 U.S. 852 (1970). It is appropriate to limit it here.

But the government contends that its activities in this case should be accepted as analogous to plea bargaining and indeed suggests that if plea bargaining is constitutional, its activities in this case are appropriate *a fortiori.*

The constitutionality of plea bargaining was upheld by the United States Supreme Court in *Brady* v. *United States*, 397 U.S. 742 (1970). See also *Santobello* v. *New York*, 404 U.S. 257 (1971); *North Carolina* v. *Alford*, 400 U.S. 25 (1970); *Cortez* v. *United States*, 337 F. 2d 699 (9th Cir. 1964); *People* v. *West*, 3 Cal. 3d 595 (1970). Essentially the Court in *Brady* sustained plea bargaining because it advanced the goals of the criminal justice system. An early plea of guilty was said to offer better prospects for rehabilitation and "with the avoidance of trail, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the State can sustain its burden of proof." 397 U.S. at 752. In short, plea bargaining is accepted because it furthers rehabilitation and promotes the finding of truth in the fact finding process. Thus the Court in *Brady* observed that "We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants advised by competent counsel, would falsely condemn themselves." *Id.* at 758. Thus is keeping with the Court's commitment to safeguard the truth finding process, it has been held that guilty pleas may not be accepted unless there is a factual basis for the plea. *Santobello* v. *New York*, *supra*, at 261; *North Carolina* v. *Alford*, 400 U.S. 25, 38 n. 10 (1970); Fed. R. Crim. P. 11.

Finally it should be observed that plea bargaining is sanctioned because without it the system of criminal justice could not function effectively. *See Santobello* v. *New York*, *supra*, at 260. Even given the institution of plea bargaining, this country confronts severe backlogs, scarce judicial resources, and overworked attorneys. Perceptions as to the desirability of plea bargaining are no doubt influenced by pragmatic considerations.

An examination of the considerations sanctioning the "venerable institution of plea bargaining" (*Parker* v. *North Carolina*, 397 U.S. 790, 808 (1970) (Brennan, Douglas & Marshall, JJ., dissenting)) should make clear that such an institution in no wise authorizes a prosecutor to threaten defendants with additional charges if they invoke guaranteed venue rights. Plea bargaining is said to advance the process of finding truth. Permitting the government to deter the exercise of venue rights would in fact inhibit the process of finding truth. Indeed Judge Gasch in this very case observed that the purpose of the venue statute in question (18 U.S.C. § 3237(b)) was to insure that defendants would be able to call character witnesses on their behalf. The Congress was concerned that defendants would not be able to bear the expenses of defending a trial in a far away district. Permitting defendants to defend in their home districts thus enables them to effectively present their cases. This enhances the fact finding process. Plea bargaining may advance the fact finding process; "venue bargaining" most assuredly does not.

Finally while plea bargaining may be necessary for the effective administration of criminal justice, venue bargaining is hardly a necessary component of the prosecutor's arsenal. Indeed the venue safeguards of 18 U.S.C. § 3237(b) would be thoroughly undermined by a contrary decision. Thus the appropriate analogy to be drawn from the facts of this case is found in *Blackledge*, not in *Brady*.

Next the government seeks to distinguish *Blackledge* by contending that since the conspiracy charge has been dsimissed, the defendant does not face the prospect of "increased charges." Rather as was the case in the District of Columbia, the defendant is faced with three

charges. To borrow terminiology from *Blackledge*, the government contends that it has not "upped the ante."[2]

The difficulty with this argument is that the government's proposed *substitution* of charges comes too late. At the time of the telephone conversations with DeMarco's counsel (see section 5 of the factual background, *supra*), the government clearly threatened the defendant with the prospect of increased charges. Due process and this court's responsibility to supervise the administration of criminal justice both require that these kinds of threats not be tolerated. Therefore it is necessary to hold that when the government threatened DeMarco, it lost its right to bring the charges it threatened to bring. Thus this court does not hold that the government can never "restructure" its case after a change of venue. It rather holds that when the government impermissively uses it charging power as a bargaining tool that its power to bring new charges will be appropriately confined.

Moreover it is by no means clear that the government has not "upped the ante" by proposing the "substitute" charges. Initially the government announced its intention to drop the 18 U.S.C. § 1001 charge contained in the District of Columbia indictment. That charge arose out of statements allegedly made in the District of Columbia, and that charge could not have initially been filed in California since venue would have been improper. Since the defendant had a statutory right to transfer the other charges, the defendant moved to transfer the § 1001 charge rather than face simultaneous prosecutions in two different places. Only after the charges were transferred did the government reveal (in connection with an explanation as to why the California indictment was not earlier filed) that it had a policy of not pursuing simultaneous prosecutions of a single defendant in different

places. Thus the defendant transferred the 18 U.S.C. § 1001 charge based on an unfounded fear, and the government now seeks to capitalize on that transfer. It now seeks to prosecute the defendant for charges which it could not otherwise have joined in a single prosecution.

Nor is it clear that the "substitution" of the new 18 U.S.C. § 1001 charge does not place a greater burden on the defendant. The prosecution has made no secret of its belief that the new 18 U.S.C. § 1001 charge is a strong charge. The "substitution" of charges is made precisely because the government believes that the chances for conviction are increased and because it believes that the substitution subjects the defendant "to a significantly increased potential period of incarceration." *Blackledge* v. *Perry*, *supra*, at 28.

Finally the proposed "substitution" of charges is not really a substitution. The government's motion to dismiss the conspiracy count is in no way conditioned on the court's decision with respect to the new charge. The government's unilateral decision to drop the conspiracy charge is said to be based on "the impact upon this prosecution which the severance of the two defendants would have." What impact the severance of the trial has had upon the government's case is uncertain (the government's case in chief cannot turn upon whether or not Mr. Newman is sitting in this courtroom since it could not have called him as a witness in any event), but it is evident that the government believes the net effect of substituting charges would be to the defendant's disadvantage, *i.e.*, it would "up the ante."

Again this is not to say, in the absence of the governmental threats involved in this case, that the government would not be entitled to justify on the record its "restructuring" of the charges involved here. *See United*

States v. *Anderson*, 514 F. 2d 583 (7th Cir. 1975); *United States* v. *Jamison*, 505 F. 2d 407 (D.C. Cir. 1974). In the absence of threats, this court would examine the restructuring in terms of whether or not vindictiveness was present and whether or not future litigants would entertain a reasonable apprehension of vindictiveness. The government concedes, for example, that if it vindictively retaliated to a defendant's assertion of venue rights by filing additional charges (however well founded). dismissal would be appropriate.

But this is not a case in which the government merely proposes to "restructure" charges. This is a case in which the government has threatened the defendant with a heavier burden if he should assert his statutory rights. In *Blackledge* the Court did not permit the prosecutor to justify the filing of a new charge. *But see North Carolina* v. *Pearce*, 395 U.S. 711 (1969). Rather the potential for vindictiveness was seen to be too severe to justify case by case *ad hoc* justification. If seven members[3] of the Supreme Court could reach such a result in circumstances where the prosecutor had threatened no one, the result reached here must follow *a fortiori*.

Non-disclosure to the Grand Jury

There is a separate reason why it is necessary to dismiss this indictment. Despite the defendant's colorable claim that the indictment was the product of improper motives and the defendant's colorable claim that the charge in question had been the subject of improper threats, the prosecutor did not disclose to the grand jury that the charge could be attacked as an unjustifiable exercise of the charging power. The grand jury was entitled to be apprised of that information so that it could make an independent judgment as to whether it was appropriate to return an indictment under the circumstances.

The role and function of the grand jury was recently described in the United States Supreme Court decision of *United States* v. *Calandra*, 414 U.S. 338, 342-43 (1974):

> The institution of the grand jury is deeply rooted in Anglo-America history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. . . . The grand jury's historic functions survive to this day.

Thus the Court in *Wood* v. *Georgia*, 370 U.S. 375, 390 (1970) spoke of the "necessity to society of an independent and informed grand jury." Moreover this perception has been consistently expressed in Court discussions of the role and functions of the grand jury. *See, e.g., United States* v. *Calandra, supra; United States* v. *Dionisio*, 410 U.S. 1 (1973); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Costello* v. *United States*, 350 U.S. 359 (1956); *Hoffman* v. *United States*, 341 U.S. 479 (1951); *Hale* v. *Henkel*, 201 U.S. 43 (1906); *Ex Parte Bain*, 121 U.S. 1 (1887).

Clearly the grand jury cannot protect against malicious prosecutions if it is not given information which is material to its determination. Nor is it decisive that the charge in this case is supported by probable cause. The case law is now clear that charges brought for unjustifiable purposes must be dismissed even if there be sufficient evidence for conviction. See, *e.g., Blackledge* v. *Perry, supra; Two Guys from Harrison-Allentown* v. *McGinley*, 366 U.S. 582 (1961); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *United States* v. *Steele*, 461 F. 2d

1148 (9th Cir. 1972); *Dixon* v. *District of Columbia*, 394 F. 2d 966 (D.C. Cir. 1968). *Lenske* v. *United States* 383 F. 2d 20 (9th Cir. 1967) (separate opinion).

To be sure, this is not aware of a case which has held that a prosecutor has a duty to disclose the type of information involved in this case, but it is hardly novel to "recognize the existence of a duty of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant." *United States* v. *Basurto*, 497 F. 2d 781, 786 (9th Cir. 1974). Nor is it ground breaking to observe that the "untainted administration of justice is certainly one of the most cherished aspects of our institutions. . . . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124 (1956); *Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956); *United States* v. *Basurto, supra*, at 786-87.

If a defendant can appropriately resist prosecution at trial on the ground that the prosecution has launched an indictment for unjustifiable purposes, it makes sense to permit the grand jury to prevent the indictment from being filed in the first place. As the Court explained in *Costello* v. *United States*, 350 U.S. 359, 362 (1956), grand juries are "pledged to indict no one because of prejudice." Thus if the grand jury's function to stand between the accuser and accused is to be safeguarded, it is necessary to impose a duty upon the government to reveal to the grand jury information bearing on colorable claims that its motives are suspect.

Whether this duty be based upon the grand jury provisions of the fifth amendment or the due process clause of

the fifth amendment, or in the exercise of this court's supervisory jurisdiction (*Bursey* v. *United States*, 466 F. 2d 1059 (9th Cir. 1972), it must be imposed.

Although this court does not find that the prosecution of the California indictment was based upon vindictive motives, it cannot divine what determination the grand jury would have reached, nor can it determine whether or not the grand jury would have wished to exercise its discretion to return an indictment had it been aware of the "venue bargaining" initiated by the government in this case.

Our Constitution wisely provides that no federal prosecution can be maintained unless laymen unfettered by "rigid procedural or evidential rules" (*Costello* v. *United States, supra*, at 362) decide in common sense that it is fair under the circumstances to bring a defendant to trial. As the Ninth Circuit Court of Appeals stated in *United States* v. *Basurto, supra*, at 785, "Today, the grand jury relies upon the prosecutor to initiate and prepare criminal cases . . . which come before it." In this case, the government did not present information vital to the grand jury's informed and independent judgment.

Therefore the indictment is dismissed.

The Clerk is ordered to serve copies of this opinion by United States mail upon the attorneys for the parties appearing in this action.

Dated this 25th day of September, 1975.

/s/ Warren J. Ferguson

WARREN J. FERGUSON
United States District Judge

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[1]Indeed the government suggests, somehwat faintly, that, if anything, there is a net decrease in the charges. The rationale for this improvisation is not spelled out by the government. Apparently the government supposes that since the conspiracy count takes up more pages of the indictment, it is a more serious charge. The

frivolity of this suggestion is apparent. Similar credence is due the government's offhand assertion that the California indictment is not based on facts which support the earlier indictment. All of the charges against DeMarco relate to the events surrounding the claim and defense of a tax deduction arising from an alleged 1969 gift by former President Nixon to the United States. Moreover, as the government conceded, the conspiracy count embraces the California facts. Even if the facts of the California indictment were wholly dissimilar from the District of Columbia indictment, a different result need not obtain. The threat of increased charges is indefensible whether or not those charges grow out of the same transaction.

[2] "MR. HOROWITZ: Your Honor, there is one other matter which relates to your Honor's scheduling somewhat, although I don't see that is should vary the scheduling which your Honor directed this morning and that is as follows:

It pertains to the Grand Jury and that's why I asked to approach the side bar. We are planning to present evidence to a Grand Jury here and request the Grand Jury to return an Indictment probably on one count charging Mr. DeMarco with an additional offense. We would plan to do so tomorrow, frankly.

Following our doing so that case will be processed in the normal course, obviously, and we will at the appropriate time make a Motion to Consolidate. At the same time that we do, your Honor, we will, if matters go as we hope they go, we will consent to a dismissal of a count which currently is in the Indictment as structured before your Honor.

There are various reasons for this but in essence [sic] the charge which would form the new count would charge Mr. DeMarco with having made false statements to certain officials of the Internal Revenue Service.

THE COURT: 1101?

MR. McNELIS: 1001.

MR. HOROWITZ: 1001. There is a charge as presently constituted which we brought when we were in D.C. when we had venue for it. We did not bring this one because we did not have venue for it and this one relies in part upon a transcript of Mr. DeMarco's testimony and we believe under all the circumstances that it would be more appropriate to prose-

cute that charge rather than a charge which currently has been prosecuted against him which, to be sure, there's more than sufficient evidence to support but was not a transcribed interview."

Clearly these remarks manifested the government's intention to drop the false statements (18 U.S.C. § 1001) count of the District of Columbia indictment. The remarks could hardly be interpreted to refer to the conspiracy count (with its attendant multiple overt acts), nor could they be construed to relate to the 18 U.S.C. § 1505 count which involved the transfer of documents.

[3]Justice Rehnquist dissented in *Blackledge;* Justice Powell dissented only on procedural grounds and did not reach the due process issue discussed above.

APPENDIX C

Affidavit in Opposition

Criminal No. 75-1188

JAY HOROWITZ, being duly sworn, deposes and says:

* * *

3. In April, 1974, William Saxbe, then Attorney General of the United States, specifically authorized the WSPF to conduct an investigation of the facts and circumstances surrounding the preparation of the 1969 joint Federal income tax return of former President Richard M. Nixon and Patricia R. Nixon, and matters related thereto. The resulting investigation, both by the WSPF and by the Federal grand jury which returned Indictment No. 75-123, was an extensive one.

4. One of several official investigations of this matter which had preceded the WSPF and grand jury inquiries was the investigation conducted by the Intelligence Division of the Internal Revenue Service ("IRS"). On February 22, 1974, during that investigation, the defendant DeMarco made the allegedly false and fraudulent statements charged in the instant indictment. Evidence supporting the conlcusion that DeMarco's testimony on that occasion had not been truthful was gathered during the very early stages of both the WSPF and grand jury investigations.

5. In July, 1974, I first had conversations about this case with Charles McNelis, Esquire, who had represented the defendant DeMarco in connection with this matter since January, 1974. Between July, 1974, and February 19, 1975, when Indictment No. 75-123 was filed, I had numerous conversations with Mr. McNelis, in his capacity as counsel to the defendant DeMarco. In several of these

conversations, I told Mr. McNelis that, in the government's opinion, the evidence appeared to establish that the defendant DeMarco's statements on February 22, 1974, had not been truthful. In addition, in several of these conversations Mr. McNelis specifically questioned me as to whether the truthfulness of the defendant DeMarco's testimony on February 22, 1974, was an issue of concern in the investigation. He was told that it was.

6. In January and February, 1975, I personally was involved, with other attorneys in this Office, in the drafting of the Indictment which subsequently was returned and filed by the Federal grand jury for the District of Columbia as Indictment No. 75-123. In the government's opinion, the evidence presented to the grand jury by that date strongly established that the defendant DeMarco had committed the crime charged in the instant Indictment. At the same time, however, there was no basis upon which the government could lay venue in the District of Columbia for a prosecution of that particular charge, which arose only from statements made by the defendant DeMarco in the Central District of California. The Federal grand jury for the District of Columbia was not asked to consider any proposed charges relating to these statements.

7. In the weeks prior to the filing of Indictment No. 75-123, I remarked to Mr. McNelis that there was no venue in the District of Columbia for a prosecution of the offense charged in the instant Indictment.

8. Following the filing of Indictment No. 75-123, and on March 19, 1975, both the defendant DeMarco, and Ralph G. Newman, then his co-defendant, filed motions to change venue to the Central District of California and to

the Northern District of Illinois—their respective districts of residence. The Government opposed these motions, arguing that the statute alleged as the basis for the change of venue, 18 U.S.C. §3237(b), did not apply to the offenses charged in this case. The government also pointed out that the District of Columbia was the most convenient forum for this trial. In this regard, the government claimed that of the nine factors relevant to determining the most convenient forum for the trial of a case (see *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 243-244 (1966)), only one—the defendants' residences—favored transfer. The defendants did not dispute this fact. In addition, the government stressed that the requested transfers would effect a severance of this case and, thus, necessitate two trials involving substantially similar proof.

9. On April 16, 1975, the District Court for the District of Columbia granted defendants' motions. Subsequently, on April 28, 1975, the District Court denied the government's Motion for Reconsideration. The Government then filed, on May 6, 1975, a petition with the United States Court of Appeals for the District of Columbia seeking a writ of mandamus requiring the District Court to vacate its April 16, 1975, Order. In its Petition, the government stated (pp. 31-32):

> Although the Government does not believe that transfer is warranted, it objects not so much to the transfer out of the District of Columbia as it does to the resulting severance.

Indeed, the government noted that it "would consent to transfer of the entire case to one district" (*Id.*, p. 32, n. 21). On July 9, 1975, the Court of Appeals denied the government's petition.

10. While final disposition of the motions to change venue was pending, I had numerous conversations concerning this case with both Mr. McNelis and William E. McDaniels, Esquire, counsel for Mr. Newman. Most of these conversations concerned matters relating to the defendants' other pre-trial motions. But during several of these conversations, the subject matter relevant to the instant motion was discussed. The substance of those conversations was as follows.

11. I told both counsel that the government possibly would be interested in compromising the issue in litigation—the request to transfer under 18 U.S.C. §3237(b). I told counsel that I believed the government ultimately would prevail on the issue. Nevertheless, since it was unclear when the Court of Appeals would act and, then, whether the losing party would seek to petition the United States Supreme Court for a Writ of Certiorari, I explored the possibility of a compromise. Counsel had stated to me that the motions for change of venue had been filed not only for purposes of transferring these cases out of the District of Columbia, but also for purposes of gaining a severance. I stated that the government would agree to a trial out of the District of Columbia, but only on the condition that it were a joint trial of the charges then pending.

12. During several of these conversations, I also discussed with counsel—as they both knew and, in Mr. McNelis's case, as he had been told prior to the filing of Indictment No. 75-123—that there were charges which possibly could have been brought against each of their clients in their respective districts of residence for which there was no venue in the District of Columbia. I told counsel that if the case was severed and transferred to these districts, the government would consider presenting evidence to Federal grand juries for these districts

and requesting these grand juries to consider proposed charges against the defendants for which there had been no venue in the District of Columbia. At the same time, however, I also told counsel that, if the case was severed, the Government necessarily would have to restructure the cases—which then, of course, would involve only one defendant—and, perhaps, consent to the dismissal of some of the pending charges.

13. The tone of these conversations was not "threatening." In making any references to the fact of a possible new charge I stated that I merely was repeating what counsel already knew—that if the cases were transferred, the government would be able to seek charges it was unable to seek in the District of Columbia.

14. In the several weeks immediately following the Court of Appeals' denial of the government's petition, I was involved, with others in this Office, in determining how this case might be restructured to accommodate the severance. Ultimately, it was concluded that the government would present evidence before the Federal grand juries for the respective transferee district relating to charges for which there had been no venue in the District of Columbia. Consistent with the regular practice of this Office, I informed both counsel that the Government was planning to proceed before these grand juries.

* * * *

APPENDIX D

Transcript of Proceedings of September 11, 1975.

Page 152:

* * *

THE COURT: Insofar as 75-1188 is concerned, the motion will be granted. The Court does not believe nor does it imply whatsoever that there was any vindictiveness on behalf of

Page 153:

Mr. Horowitz or anyone else in the Special Prosecutor's Office and I am not dealing with intent; I am dealing with what happened, the act. I think the case falls clearly within Blackledge.

And it is very interesting, you know, that Blackledge, insofar as Part 2 is concerned—insofar as Part 1 is concerned was an eight-to-one decision. Justice Rehnquist dissented completely and Mr. Powell, Justice Powell, joined in Part 2 only of Justice Rehnquist's dissent. But insofar as the basic thrust of Blackledge,

> "A person convicted of an offense is entitled to pursue his statutory right to a trial de novo without apprehension that the State will retaliate by substitutuing a more serious charge for the original one thus subjecting him to a significantly increased potential period of incarceration.
>
> "Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered Appellate process."

If Mr. DeMarco had not moved for a change of venue 1188 would have not been brought. I feel that the case falls not only within Blackledge but I think it also falls within Pierce that the prophylactic barrier between—to show that

Page 154:

there was no vindictiveness or there was not a possibility of vindictiveness would require a full and complete presentation of what happened in the past before a Grand Jury.

The Court will write a fuller opinion explaining its ruling. But that motion is granted.

* * *

APPENDIX E

Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment

Criminal No. 75-1188

* * *

I. *Chronology of Relevant Facts*

* * *

February, 1975—On February 19, 1975, Frank DeMarco and Ralph Newman were indicted in the United States District Court for the District of Columbia.[28] Timely motions, electing to be tried in the district of residence, were filed by both defendants pursuant to 18 U.S.C. § 3237(b). Those motions were granted on April 16, 1975.

April, 1975—On April 17, 1975, counsel for DeMarco received a telephone call from Mr. Jay Horowitz of the Watergate Special Prosecution Force. The substance of that call was: we are considering filing a motion for reconsideration of the order of transfer dated April 16, 1975; also, we're considering more counts against Frank and we will restructure the case against him if it goes to California. Mr. Horowitz then asked if we would agree to a joint trial in Chicago with Newman.[29] The answer was: "No."

On April 21, 1975, the Government filed its Motion For Reconsideration. Therein, it is stated:

> "The Government emphasizes that it would not be unalterably opposed to a *single* joint trial in an-

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[28]That Indictment is now before this Court as Cr. 75-1129.

[29]App. A.

other district. The injustice here, however, is the requirement of two separate trials. . . ."[30] (Underscoring in original.)

The Motion For Resideration was denied on April 28, 1975.

May, 1975—On May 6, 1975, the Government petitioned the United States Court of Appeals for the District of Columbia for a writ of mandamus requiring the lower court to vacate the transfer order dated April 16, 1975. Once again the Government emphasized its objection to the self-proclaimed "absurd results"[31] stressing that it ". . . objects not so much to the transfer out of the District of Columbia as it does to the resulting severance."[32] The petition for a writ of mandamus was denied on July 9, 1975.

Sometime subsequent to April 17, 1975, and considerably prior to July 29, 1975, counsel for DeMarco received several telephone calls from Mr. Horowitz. The substance of one of these calls was: we don't mean this as a threat, I'm sure you understand that, but if Frank does not agree to be tried jointly with Newman at Chicago, he will be indicted for false statements made to agents of the Revenue Service on February 20, 1974, at Los Angeles.[33] On July 29, 1975, Frank DeMarco was indicted in the Central District of California for alleged false statements made to the Internal Revenue Service on February 22, 1974.

* * * *

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[30]Memorandum For The United States In Support Of Its Motion For Reconsideration, p. 12.

[31]Petition For A Writ of Mandamus, pp. 19-21.

[32]*Id.* at 31-32. "Indeed, the Government would consent to transfer of the entire case to one district." Fn. 21 of Petition at p. 32.

[33]App. A.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1671

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRANK DEMARCO, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1671

UNITED STATES OF AMERICA,

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vs.

FRANK DEMARCO, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below

The opinion of the District Court (Pet. App. 7a-23a)[1] is reported at 401 F. Supp. 505 (C.D. Cal.). The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-6a), affirming the decision of the District Court, is reported at 550 F. 2d 1224.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari. (Pet. 1)

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[1]The following abbreviations are used in this Brief: "Pet." for Petition for Writ of Certiorari; and "Pet. App." for Appendix of the Petition.

Question Presented

Whether it is an abuse of discretion for a District Court to dismiss an indictment pursuant to the principles of *Blackledge v. Perry*, 417 U.S. 21 (1974) and the court's inherent power to supervise the administration of criminal justice when a prosecutor, in an effort to prevent a defendant from exercising his statutory venue right, twice threatened that if the defendant exercised that right, the charges against him would be increased; and after that right was exercised, the Government filed an additional charge which was based upon conduct known by the prosecutor prior to the return of the original indictment?

Counterstatement of the Case

This case involves a dismissal of a one-count indictment by the District Court for the Central District of California, which found that the prosecutor for the Watergate Special Prosecution Force ("WSPF"), in an attempt to prevent the defendant/respondent, Frank DeMarco, Jr. from availing himself of a District Court order granting a change of venue, twice threatened to charge him with an additional offense. The first threat was made after the District Court for the District of Columbia granted Mr. DeMarco's motion to change venue; the second threat was made after the WSPF filed a Petition for Writ of Mandamus with the Court of Appeals for the District of Columbia seeking to reverse the order granting the change of venue. After the case was transferred to the Federal District Court in Los Angeles, the WSPF obtained the threatened indictment. The factual basis for the new indictment had arisen out of the same course of conduct as the originally charged offenses, and was

known to the Government prior to the initiation of the original prosecution. In fact, the District of Columbia grand jury that returned the original indictment was presented with evidence of alleged conduct which resulted in the second indictment. (Pet. 4; Pet. App. 4a)

In dismissing this new indictment, the District Court found:

> "that the defendant at the time of the telephone conversations was deliberately placed on notice that if he exercised his statutory venue rights, the prosecution threatened to respond by 'upping the ante.'" (Pet. App. 11a)

The dismissal by the District Court of this new indictment was pursuant to the principles of *Blackledge v. Perry*, 417 U.S. 21 (1974) and the court's supervisory power over the administration of criminal justice.[2]

Many of the factual assertions upon which Petitioner's claims of lower court error are predicated do not find support in the record and are misstatements of the findings and conclusions of the District and Circuit Courts. In order to put the issues in their proper factual perspective, we set forth the facts as adduced by the District Court and affirmed by the Court of Appeals.

Statement of Facts

The case at bench arose from an investigation into the preparation of President Nixon's 1969 income tax returns in which a deduction was claimed for a gift

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[2]The original indictment, after transfer to California, was also dismissed after three weeks of trial because of intentional Government misconduct. *See* 407 F. Supp. 107 (C.D. Cal. 1975).

of certain papers to the United States. Mr. DeMarco and Ralph Newman were indicted by a grand jury for the District of Columbia in February, 1975, for violations of 18 U.S.C. §§ 371, 1001 and 1505. Count I charged Messrs. DeMarco and Newman with conspiring to defraud the United States; Count III charged Mr. DeMarco with making false statements to IRS Agents Lonegro and Calogero on January 18, 1974 in the District of Columbia; and Count IV charged Mr. DeMarco with obstructing proceedings of the Joint Committee on Internal Revenue Taxation ("Joint Committee"). Counts III and IV were based upon an interview of Mr. DeMarco by the IRS Agents and the Joint Committee in which the Agents took extensive notes. Agent Calogero had also participated in an interview of Mr. DeMarco in California on February 22, 1974, at which time the same operative questions as those involved in the January 18 interview were asked and the same answers given.

Messrs. DeMarco and Newman each filed timely motions pursuant to 18 U.S.C. § 3237(b), whereby each sought a change of venue to the district of their respective residences.[3]

The prosecutor vigorously opposed transfer. After hearing, on April 16, 1975, Judge Gasch granted each of the motions of Messrs. DeMarco and Newman to transfer the case to their respective residences. Thus, Mr. DeMarco's case was transferred to the Central District *of* California, and Mr. Newman's to the North-

[3]Authority to transfer Count III (§ 1001) was not bottomed upon § 3237(b), but upon Federal Rules of Criminal Procedure 21(b), *i.e.*, to insure the convenience of the parties and witnesses. (Pet. App. 9a) No motion for severance was ever filed on behalf of either Mr. DeMarco or Mr. Newman.

ern District of Illinois. (Pet. App. 9a) The prosecutor's motion for reconsideration before Judge Gasch was denied, and the prosecutor, on May 6, 1975, then petitioned the United States Court of Appeals for the District of Columbia for mandamus, which petition was ultimately denied on July 9, 1975. (Pet. 6-7)

On April 17, 1975, the day *after* Judge Gasch had granted Mr. DeMarco's motion, his counsel Mr. McNelis received a telephone call from the WSPF prosecutor—Jay Horowitz. Horowitz stated that if Mr. DeMarco acted upon the venue change and went to trial in California, the Government would consider bringing more counts against him and restructuring the case. (Pet. App. 2a, 9a) Since the prosecutor was fighting strenuously to avoid the resulting severance, Horowitz stated that there would be no initiation of new charges if Mr. DeMarco would agree to a joint trial with Newman. (Pet. App. 27a) Mr. DeMarco refused.

On July 9, 1975, after the mandamus petition in the D.C. Circuit was denied, Horowitz informed Mr. McNelis that if Mr. DeMarco did not agree to be tried jointly with Newman in Chicago, he would be indicted for false statements made to IRS Agents in Los Angeles on February 22, 1974. (Pet. App. 9a)

On July 29, one day following Mr. DeMarco's arraignment on the transferred indictment from the District of Columbia, the prosecutor obtained an indictment from the grand jury in the Central District of California (No. 75-1188, hereafter "California indictment"), which alleged that Mr. DeMarco made false statements to the IRS Agents in the interview conducted in Los Angeles on February 22.

Both courts below found the charges in the two indictments predicated upon the same operative facts. (Pet. App. 3a, 4a, 22a) The same IRS Agent participated in both interviews; the same questions were asked and same answers given in both interviews; Mr. DeMarco's statement in California was actually submitted to the District of Columbia grand jury; and it was offered in evidence at the trial.

Trial and Appellate Court Opinions

The District Court dismissed the indictment, holding, *inter alia*, that the Government's threats to file the additional charge were made for the purpose of deterring Mr. DeMarco from exercising his statutory right to venue change. (Pet. App. 10a) Contrary to the Government's suggestions in the Petition (Pet. 7) and its incomplete presentation of the evidence and representations which were before the District Court, the District Court found that the threats to indict were made *after* the venue motions had been filed and granted, in order to impose upon the defendant "a heavier burden if he should assert his statutory rights" (Pet. App. 18a) and not during "pending litigation" as part of a compromise. (Pet. App. 10a)

The District Court did not, as alleged in the Petition (Pet. 9), find consistency in the affidavits submitted before it relative to the telephone conversations. While it found no inconsistency between the "renditions of these conversations" (Pet. App. 10a) it did find that "at the time of the telephone conversations, the government deliberately used the threat of a new indictment in California to deter the defendant from exercising his statutory rights." (*Id.*) Dismissal was not only

upon due process considerations, but also upon the court's supervisory role over the administration of criminal justice. (Pet. App. 7a, 16a)

Focusing upon the choice confronting Mr. DeMarco when the threats were made, the District Court held:

> ". . . Mr. DeMarco was entitled to pursue his statutory venue rights free of the apprehension that the government would retaliate by filing additional charges. [Citations omitted] He was entitled to pursue those rights free of threats and intimidation, even from threats presented in a non-threatening tone." (Pet. App. 13a)

Furthermore, the District Court did not hold that the Government could never restructure its case when circumstances changed, as contended by Petitioner. (Pet. 14) Rather, it only held that if the Government "impermissively uses its charging power as a bargaining tool . . . its power to bring new charges will be appropriately confined." (Pet. App. 14a)

The Court of Appeals found no reason to disturb the District Court's findings of fact and conclusions of law. It affirmed the decision below, holding that:

> "*Blackledge* and [*North Carolina v.*] *Pearce* each establish a prophylactic rule imposing limits upon prosecutorial discretion in seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation for a defendant's exercise of a statutory right that has due-process implications." (Pet. App. 6a)

The Court of Appeals concurred with the District Court's findings that "the factual nucleus of both indictments was the same" (Pet. App. 4a), and that "the

California statement was a duplicate of DeMarco's statement in the District of Columbia to the Joint Committee, upon which the original indictment was, in part, based." (*Id.*) In response to the Government's argument that it was "equitably restrained" from prosecuting Mr. DeMarco in California until the venue change was granted and accepted, the Court of Appeals rejected any notion that this was a "major change" in circumstances which operated to distinguish *Blackledge* from the case before it. Just as the District Court had found that the Government's "policy" of not maintaining simultaneous prosecutions was an insufficient after-the-fact justification for the new prosecution, revealed only *after* the original indictment had been transferred (Pet. App. 16a), the Court of Appeals held that the prosecutor's purported justification was "unsupported by the record." (Pet. App. 4a)

> "The only 'major change' was severance resulting from DeMarco's exercise of his statutory venue right. The Government cannot rely on the exercise of that right to defeat *Blackledge*.
>
> * * *
>
> "Here, as in *Blackledge*, a prosecutor 'has considerable stake in discouraging' defendants from exercising their venue rights when the effect 'will clearly require increased expenditures of prosecutorial resources' because the prosecutor loses the advantages of trying alleged conspirators together and must also conduct two trials in different parts of the country. [Citation omitted]." (Pet. App. 4a-6a)

The Court of Appeals' conclusion was that "it was not constitutionally permissible for the Government to threaten to 'up the ante' to discourage DeMarco from exercising his venue right." (Pet. App. 6a)

ARGUMENT

This Court Should Not Grant a Writ of Certiorari to Entertain Twice Rejected Factual Assertions Where the District and Appellate Courts' Decisions Are Supported by Substantial Evidence and Are in Accord With Other Federal Decisions.

Two courts in the case at bench have ruled that prosecutorial conduct created, at minimum, the "appearance of vindictiveness" which *Blackledge* condemns. These decisions are consistent with the decisions of the various circuits. *See, e.g. United States v. Ruesga-Martinez,* 534 F. 2d 1367 (9th Cir. 1976); *Hayes v. Cowan,* 547 F. 2d 42 (6th Cir. 1976), *cert. granted sub nom. Bordenkircher v. Hayes,* ..... U.S. ..... (June 6, 1977); *United States v. Johnson,* 537 F. 2d 1170 (4th Cir. 1976); *United States v. Jamison,* 505 F. 2d 407 (D.C. Cir. 1974); *United States v. Gerard,* 491 F. 2d 1300 (9th Cir. 1974). The factual determinations and legal conclusions of the District Court, based upon a full presentation of evidence not appearing in the Petition, and affirmation of those determinations and conclusions by the Court of Appeals should not be further reviewed by this Court. It is a settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

A. The Filing of the California Indictment Was the Prosecutor's Retaliation for Mr. DeMarco's Refusal to Accede to a Waiver of His Venue Rights.

Where the Government's knowledge of a defendant's conduct allows the Government to charge multiple offenses, or offenses of differing severity, and the Government opts not to charge all offenses, or the most severe, "upping the ante" upon retrial by charging additional or more serious offenses is proscribed by principles of due process. *Blackledge v. Perry,* 417 U.S. 21 (1974); *United States v. Jamison,* 505 F. 2d 407 (D.C. Cir. 1974). Prosecutorial charging decisions are particularly circumscribed where an increase or substitution of charges is motivated, even in appearance, by a defendant's refusal to waive a procedural or constitutional right. *United States v. Ruesga-Martinez,* 534 F. 2d 1367 (9th Cir. 1976). The operative fact which condemns institution of additional or more serious charges is a finding that these new charges are based upon conduct known by the Government to have criminal repercussions when the initial charges were brought. *United States v. Johnson,* 537 F. 2d 1170, 1172-73 (4th Cir. 1976). Only where an event occurs between the first and second indictment which on its face negatives the appearance of retaliation, will a charge increase be condoned. After-the-fact rationalizations to purportedly justify the additional charge cannot overcome governmental action which, on its face, smacks of vindictiveness or carries the appearance of retaliation; for it is the *appearance* of

vindictiveness as well as actual retaliation which the courts proscribe. *Blackledge v. Perry*, 417 U.S. at 27-28. *See also United States v. Jamison, supra*, 505 F. 2d at 415-416; *United States v. Johnson, supra*, 537 F. 2d at 1173.

Petitioner admits that the February 22 interview not only would have given rise to a criminal prosecution, and that it was aware of same, but also that it was presented as evidence to the District of Columbia grand jury which returned the original indictment against Mr. DeMarco. (Pet. 4)

The Government chooses to downplay this pivotal fact, instead arguing that the change of venue somehow freed it from the principles of *Blackledge*. However, the facts are otherwise. Both courts below rejected Petitioner's assertion that the change of venue and severance was " 'a major change legitimately bearing on the prosecution function' which justifies distinguishing *Blackledge*. . . ." (Pet. App. 4a, 16a, 18a)

This Court in *Blackledge* noted the type of "change" in circumstances which would permit increased charges, *viz.* where the state "had shown that it would have been *impossible* to proceed on the more serious charge at the outset. . . ." (417 U.S. at 29 n. 7; emphasis added)[4] In the case at bench, however, no constitu-

[4]The example there used was *Diaz v. United States*, 223 U.S. 442 (1931), in which after the defendant had been tried and convicted for assault and battery, the assault victim died. The subsequent trial and conviction for homicide was constitutionally proper "since the crime of homicide was not complete until after the victim's death." (417 U.S. at 29 n. 7)

tional or statutory barrier prevented the Government from initiating a criminal prosecution based upon the February 22 interview on or before the time the District of Columbia indictment was returned. No substantive factual change or discovery of evidence intervened between the return of the District of Columbia indictment and the California indictment which could explain the Government's belated attempt to prosecute. As the Court of Appeals found:

> "The only 'major change' was severance resulting from DeMarco's exercise of his statutory venue right. The Government cannot rely on the exercise of that right to defeat *Blackledge*." (Pet. App. 4a)

Furthermore, the record belies Petitioner's claim that the initial decision not to indict Mr. DeMarco in California was based upon an "equitable restraint" which ceased upon transfer of the case to California. (Pet. 13) Both courts below rightfully rejected this *ipse dixit* phrase "equitable restraint." The District Court found it to have been an after-the-fact invention which, in actuality, penalized the defendant for his transfer of one of the charges from the District of Columbia. (Pet. App. 16a) Moreover, the logic of this contention

The court in *United States v. Jamison, supra*, also posted a situation which might justify increased charges, *i.e.*, where the Government was unaware of the existence of the more serious crime when it originally indicted the defendant. (505 F. 2d at 416-417) *Cf. United States v. Preciado-Gomez*, 529 F. 2d 935 (9th Cir.), *cert. denied*, 425 U.S. 953 (1976).

is defeated by Petitioner's own arguments before this Court. Consider Petitioner's argument that the February 22 interview did not give rise to a charge in the District of Columbia because venue would have been improper. Thus, the prosecution did not institute proceedings in California because to do so "would have subjected DeMarco to multi-district, pre-trial litigation at opposite ends of the continent." (Pet. 12-13) From this premise, Petitioner argues the change of venue to California removed the alleged "equitable restraint" upon proceeding in California. (Pet. 14)

Petitioner earlier argued, however, that venue considerations *were not the major concern* when it sought to reverse the venue change. Rather, it was the fact of *severance* which the Government was seeking to avoid (Pet. 6) and the Government would have consented "to transfer of the entire case to one district." (Pet. 7) Assuming the accuracy of the Government's representation, when the case was transferred to California the "equitable restraint" precluding prosecution of Mr. DeMarco for the February 22 interview would have no longer existed, since venue would properly lie in California. However, per the Government's own representations, *even had the entire action been transferred to California, the Government would still not have proffered a charge based upon the February 22 interview*. The prosecutor averred that the four charges included in the District of Columbia indictment would

have been the *only* ones upon which a trial in any other jurisdiction would have occurred.[5]

In reality "equitable restraint" had *nothing* to do with the Government's choice not to prosecute Mr. DeMarco upon the February 22 interview.[6] A joint trial in California of Messrs. DeMarco and Newman would have withdrawn all "equitable restraint" upon prosecuting Mr. DeMarco for statements made in California; but no such prosecution would have occurred per representations of Horowitz. The additional charge against Dr. DeMarco was brought only in retaliation for his successful severance, and for his requiring "increased expenditures of prosecutorial resources." *Blackledge v. Perry, supra,* 417 U.S. at 27.

B. The Venue Bargaining Tactics by the Government in the Case at Bench Are Far Removed From the Examples Postulated by the Petitioner.

Petitioner sets forth its "parade of horribles" (Pet. 16-17) regarding common trial and pretrial situations

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[5]Horowitz affidavit, ¶11:

". . . Counsel had stated to me that the motions for change of venue had been filed not only for purposes of transferring these cases out of the District of Columbia, but also for purposes of gaining a severence. *I stated that the government would agree to a joint trial out of the District of Columbia, but only on the condition that it were a joint trial of the charges then pending.*" (Pet. App. 27a; emphasis added.)

[6]Rather than from benevolent motives, it is far more likely that a simultaneous indictment was not sought in California by the Government while the District of Columbia indictment was pending for fear that Mr. DeMarco could successfully seek consolidation of the cases in his home district—Los Angeles. There was no legal impediment to simultaneous prosecutions in different districts. *Cf. United States v. United States Gypsum Co.*, 383 F. Supp. 462, 470 (W.D. Pa. 1974); *United States v. Bowles*, 183 F. Supp. 237, 242-243 (D.Me. 1958).

purportedly analogous to the facts herein, and suggests that these prosecutorial practices would be impermissible if the decision in the case at bench were upheld. But the examples of a successful defense motion for severance thus allowing the Government to introduce evidence excluded from a joint trial or a defendant's calling of a character witness thus allowing the prosecutor to introduce otherwise inadmissible evidence as posited by Petitioner are far removed from the facts here. In the Petitioner's examples, the prosecution has *absolutely no option* to do what it desires prior to affirmative action by the defendant; the Government's hands are tied until the defendants are severed or character witnesses testify. No conscious prosecutorial choice *not* to exercise the option ever exists; the event itself makes the impossible possible. *See Diaz v. United States*, 223 U.S. 442 (1931). However, in this case the Government *always* had the option to charge Mr. DeMarco in California upon the February 22 interview. Once this fact appears, the principles of *Blackledge* come into play.

To the Government's credit, it does not attempt to equate the venue bargaining activity herein with plea bargaining. *See Hayes v. Cowan*, 547 F. 2d 42 (6th Cir. 1976), *cert. granted sub nom. Bordenkircher v. Hayes*, ... U.S. .... (June 6, 1977). As found by the District Court:

> ". . . [W]hile plea bargaining may be necessary for the effective administration of criminal justice, venue bargaining is hardly a necessary component of the prosecutor's arsenal. Indeed the venue safeguards of 18 U.S.C. § 3237(b) would be thoroughly undermined by a contrary decision. Thus the

> appropriate analogy to be drawn from the facts of this case is found in *Blackledge*, not in *Brady* [*v. United States*, 397 U.S. 742 (1970)]." (Pet. App. 15a)

Conclusion

The Petition requests this Court to reconsider factual findings and legal conclusions made by the District Court and approved by the Court of Appeals. That task is not one that should be undertaken by this Court. The holdings of both the District Court and Court of Appeals are in accord with the applicable prevailing law and compelled by the factual record before those courts. Petitioner has not demonstrated, as it cannot, any meritorious reason why its Petition should be granted.

For the foregoing reasons, respondent submits that the Petition for Certiorari should be denied.

DATED: June 28, 1977.

Respectfully submitted,

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No. 76-1671

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DEMARCO, JR., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

EVENTS INTERVENING BETWEEN THE FILING OF THE ORIGINAL INDICTMENT AND THE FILING OF THE LOS ANGELES INDICTMENT JUSTIFIED THE BRINGING OF THE ADDITIONAL CHARGE.

The Petition for Writ of Certiorari asks this Court to find that its decision in *Blackledge* v. *Perry*, 417 U.S. 21, the progeny of its earlier decision in *North Carolina* v. *Pearce*, 395 U.S. 711, was interpreted erroneously by the lower courts. The Government urges that, on two grounds, the rule of *Blackledge* is inapplicable here. First, *Blackledge* proscribed the bringing of the more serious charge only where the facts were initially amenable to charges of varying degrees of severity and the prosecutor had opted for the less severe alternative. Obviously, nothing of the sort happened here. Second, *Blackledge* proscribed the bringing of the more serious charge only where there

had occurred no intervening event which would justify the restructuring of the prosecution. In this case, the change of venue removed the legitimate reason for not having brought a contemporaneous indictment in the Central District of California, and warranted reconsideration of the prosecutor's options.

The Brief in Opposition deals principally with this latter distinction. DeMarco agrees that, "where an event occurs between the first and second indictment which on its face negatives the appearance of retaliation . . . a charge increase [will] be condoned" (Brief in Opposition, p. 11), but urges that there was no such event. This Reply Brief focuses on that point.

Prior to the transfer of the District of Columbia charges, there was no way in which the Government could have resolved all possible criminal charges against DeMarco in one case. Given its view that venue as to both DeMarco and his co-defendant Newman existed in the District of Columbia, the Government opted for the sensible and rational course of attempting to resolve all criminal charges arising out of the Nixon tax returns in one prosecution. Even if the case had not raised issues of national interest, this alternative would have been the wise one. Given the historical context of the charges, the decision not to bifurcate the prosecution was correct beyond question.

It is therefore clear that the original decision to proceed only in the District of Columbia was based not on any infirmity in the California charge but, rather, on the judgment that one criminal proceeding was enough. DeMarco agrees that there was no statutory or constitutional barrier to the institution of a parallel proceeding in the Central District of California (Brief in Opposition, pp. 12-13). The absence of a barrier to prosecution,

however, does not, in an enlightened system of law enforcement, require the bringing of the charge. It merely triggers consideration of whether, under all the circumstances, the charge should be brought. In this case, for reasons which are defective only in the hindsight of the lower court opinions, the Government decided not to subject itself and DeMarco to multiple and costly litigation, a judgment which it would seem the courts should approve rather than discourage.

DeMarco strenuously urges that there was no equitable restraint which blocked the bringing of the charge in the Central District of California. He offers no alternate reason why the Government should have refrained from doing so but suggests that, had such a charge been brought contemporaneously with the District of Columbia indictment, it might have been the basis for a successful motion by DeMarco to consolidate the charges in Los Angeles (Brief in Opposition, p. 15, n. 6). This argument is without support in the record and flies in the face of the undisputed proposition that no one District Court has the power to order trans-district consolidation. *United States* v. *Sklaroff*, 323 F. Supp. 296, 324 (S.D. Fla.). It would have had no effect whatever on the transferability of the District of Columbia charges had there been a Central District of California charge pending.[1]

DeMarco challenges the Government's claim that equitable restraint prevented it from bringing the Central District of California charge by arguing that, after Judge

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[1]Transferability of the District of Columbia charges under 18 U.S.C. § 3237(b) would not have been made more or less likely by the pendency of the Central District of California charges. Convenience considerations would have dictated one trial in the District of Columbia against both Newman and DeMarco.

Gasch ordered the cases against Newman and DeMarco transferred to their respective districts of residence, the principal concern expressed by the Government was that there be a joint trial. This argument overlooks the critical fact that several months had passed between the time when the Government was faced with the decision whether to bring a parallel proceeding (February, 1975) and the time when the Government was faced with the likelihood of separate trials (April, 1975). At the later date, in light of Judge Gasch's adverse decision, the Government was willing to abandon its right to seek the California indictment; however, it does not follow, as Respondent would have it, that the Government's initial exercise of restraint was based on other than purely equitable grounds. All that follows is that, faced with an inevitable serverance if Judge Gasch's ruling were sustained, the Government was prepared to waive its right to bring additional charges and its right to appeal if it could preserve a joint trial. In no way does this later stance derogate from the conclusion that equitable considerations alone initially prevented the California prosecution.

It is apparent, therefore, that the circumstances intervening between the time when the California charge could have been brought and the time when it actually was brought justified the restructuring of the prosecution and completely negatived either the possibility or the appearance of retaliation. *Blackledge* is simply inapposite to this case.[2]

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[2]In addition to the cases cited at page 14 of its Petition, which demonstrate the inapplicability of *Blackledge* to situations in which there have occurred legitimate changes in circumstances, the Government would direct the Court's attention to *United States* v. *Cahn*, No. 76-1328 (C.A. 2), *certiorari denied*, 45 U.S.L.W. 3634 (March 22, 1977). In that case, after a mistrial, in order to counter the defendant's testimony, the Government superceded the original seven-count indictment with one of forty-six counts. Govt. Brief

Since the filing of the Petition, the Court has granted certiorari in *Hayes* v. *Cowan*, 547 F. 2d 42 (C.A. 6), *certiorari granted sub nom. Bordenkircher* v. *Hayes*, 45 U.S.L.W. 3785 (June 6, 1977). *Hayes* is distinguishable from this case because, as respondent points out, it involves a claim of retailiatory prosecution in the special context of plea bargaining, but is, at the same time, closer to the facts of *Blackledge*, for it appears that no event intervened between the filing of the original charge and the filing of the more severe charge other than the defendant's insistence on his right to trial. In any event, review of the *Hayes* decision will require reexamination of the boundaries of *Blackledge*, and in order to bring some degree of uniformity to the decisions of the lower courts, some of which have applied the *Blackledge* holding to cases arising in far different factual settings,[3] it is appropriate that the Court grant this petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 1977.

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on Appeal, pp. 5-6. The Court of Appeals held that *Blackledge* was inapplicable because there was an explanation for the more severe charges other than retaliation.

[3]See, e.g., *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (C.A. 9); and *United States* v. *Jamison*, 505 F. 2d 407 (C.A.D.C.).